

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
UNITED STATES OF AMERICA, : Docket #1:22-mj-01638-
 : UA All Defendants
 :
Plaintiff, :
 :
- against - :
 :
BORKER, VITALY, : New York, New York
 : February 18, 2022
 :
Defendant. :
 :
----- : PRESENTMENT

PROCEEDINGS BEFORE
THE HONORABLE STEWART D. AARON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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THE CLERK: This is in the matter of US against Vitaly Borker, docket number 22-mag-1638.

Counsel, please state your appearance for the record.

MR. MATTHEW A. WEINBERG: Yes. Good afternoon. Matthew Weinberg appearing for the government. And joining me at counsel table is Postal Inspector Daniel Gable.

HONORABLE STEWART D. AARON (THE COURT): Good afternoon.

MR. JOHN A. DIAZ: Good afternoon, your Honor. John Diaz, along with Corey Garcia from C.J. Mentoring Program, representing Mr. Vitaly Borker.

THE COURT: Good afternoon.

May I please have the date and time of arrest?

MR. WEINBERG: Yes, your Honor. The defendant was arrested this morning, February 18, 2022, at approximately six-ten a.m.

Mr. Borker, I am Magistrate Judge Aaron. You're here because you're charged with certain crimes by a Complaint. The purpose of today's proceeding is to advise you of certain rights that you have, to inform you of the charges against you, to consider whether counsel should be appointed for you and decide under what conditions, if any, you shall be released pending trial.

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I'm now going to explain certain Constitutional rights that you have. You have the right to remain silent. You are not required to make any statements. Even if you've already made statements to the authorities, you do not need to make any further statements. Any statements you do make can be used against you.

You have the right to be released, either conditionally or unconditionally, pending trial unless I find there are no conditions that would reasonably assure your presence at future court appearances and the safety of the community.

If you are not a United States citizen, you have the right to request that a government attorney or a law enforcement official notify a consular officer from your country of origin that you've been arrested. In some cases a treaty or other agreement may require the United States government to give that notice whether you request it or not.

You have the right to be represented by an attorney during all court proceedings, including this one, and during all questioning by the authorities. If you cannot afford an attorney, I will appoint one today to represent you.

Do you understand those rights as I've just

1
2 explained them?

3 MR. VITALY BORKER (THE DEFENDANT): (No audible
4 response.)

5 THE COURT: All right. So I have before me a
6 Financial Affidavit. Am I correct, Mr. Borker, that you
7 signed this document?

8 THE DEFENDANT: (No audible response.)

9 THE COURT: All right, I would ask you to please
10 raise your right hand. Do you swear that the contents of
11 this affidavit are true and correct, so help you God?

12 THE DEFENDANT: (No audible response.)

13 THE COURT: All right, based upon what's set forth
14 in this document, I am approving the appointment of
15 counsel.

16 The issue of counsel I'm going to leave open for
17 revisiting by the district judge based upon your financial
18 circumstances, but for purposes of today's proceeding, I am
19 approving the appointment.

20 So the document that contains the charges against
21 you is called a Complaint. And the Complaint has been
22 sworn out by my colleague, Magistrate Judge Cott. And it
23 contains certain counts, mail fraud, wire fraud, aggravated
24 identity theft, in connection with the sale of eyeglass,
25 eye ware sales, the sales of eyeglasses.

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Let me ask counsel, have you had an opportunity to review the charges in the Complaint with your client?

MR. DIAZ: Yes, your Honor, I have had an opportunity to review the Complaint; and at this time we are prepared to waive its open reading.

THE COURT: All right. Thank you.

So, Mr. Borker, you're entitled to what's called a preliminary hearing at which the government will have the burden of showing that there's probable cause to believe that the crime for which you are being charged has been committed and you are the person who committed it. At the hearing, you or your counsel will be entitled to cross-examine any witnesses and introduce evidence; however, a preliminary hearing will not be held if you're indicted by a grand jury before the date of a preliminary hearing. I will set a preliminary hearing date at the conclusion of these proceedings.

I'll next hear from the government with respect to its position on bail, detention or release.

MR. WEINBERG: Your Honor, the government is seeking detention.

THE COURT: And, counsel, what is your intentions in that regard?

MR. DIAZ: Your Honor, we'd be asking the Court to

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1
2 approve a set of conditions to allow the release of my
3 client.

4 THE COURT: Okay, so here's the way we'll proceed,
5 please. I'll first hear from the government with respect
6 to the grounds upon which it's seeking detention, and then
7 obviously I'll hear from Mr. Diaz with respect to his
8 position. And I may, of course, have questions along the
9 way. But let me first hear from the government.

10 MR. WEINBERG: Yes, your Honor. So first, just
11 for purposes of the record and to be clear and precise
12 about the operation of the law here, the government is
13 seeking the detention hearing pursuant to 18 USC
14 3142(f)(2)(A) and (B) because there is a serious risk that
15 the defendant will flee or obstruct or attempt to obstruct
16 justice. And then, in turn, the government is then seeking
17 detention for those reasons and also on the grounds of
18 dangerousness to the community.

19 Just stepping back and going through the history
20 here, the defendant was first charged in December 2010 in
21 connection with -- and this is obviously a prior
22 proceeding, not first charged in this case -- but first
23 charged in a prior proceeding in December 2010 in this
24 district in connection with his operation of a website
25 called decormyeyes.com, which also involved the sale of

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2 eyeglasses. In that case the defendant was charged with
3 mail fraud and wire fraud and also with making interstate
4 threats based on threatening messages sent to customers of
5 that website. The defendant pled guilty in May 2011 and
6 was sentenced to four years in prison.

7 The defendant was released in 2015 from prison.
8 He was then arrested again in May 2017 for his operation
9 of a second website called opticsfast.com, opticsfast.com a
10 very similar website to decormyeyes.com, a very similar
11 scheme and similar alleged conduct. In that case,
12 importantly, the defendant was operating opticsfirst.com
13 prior to going to prison for DecorMyEyes and continue to
14 operate it during his pretrial release for the first charge
15 for DecorMyEyes and continued to operate it from prison. I
16 think, you know, others were actually operating the
17 website, but he was involved in the operation. The
18 defendant was sentenced to two years in connection -- well,
19 in connection with this second charge, the second arrest
20 for OpticsFast, he was ultimately pled guilty and was
21 sentenced to two years in prison on those charges and also
22 was sentenced to two years in connection with a violation
23 of supervised release because he was on supervised release
24 for the first crime when he committed the second crime.

25 The defendant entered a residential reentry center

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2 in June 2020 at the end of his prison term for the
3 OpticsFast charges, and the allegations in the Complaint
4 are that the defendant began the instant conduct
5 immediately upon entering the residential reentry center
6 and then ultimately, once released from that residential
7 reentry center to his home.

8 So, obviously, his history speaks to, you know,
9 the defendant's dangerousness to the community, utter
10 inability to abide by the law, but it also demonstrates his
11 unfitness for pretrial release. Again, not to belabor this
12 point, but the OpticsFast scheme continued when he was on
13 pretrial release for DecorMyEyes, and then it also
14 continued when he was on supervised release following his
15 release from prison in 2015. In connection with that, from
16 September 2015 through April 2017, the defendant was
17 submitting monthly reports to Probation stating that he was
18 working at a dry-cleaning business, did not disclose his
19 role in opticsfast.com and took material steps to hide his
20 role in opticsfast.com. So, obviously, he was misleading
21 Probation during that time.

22 There is case law -- I can give citations if you'd
23 like -- but that, you know, individuals who violate
24 pretrial release and probation are poor candidates for bail
25 in future proceedings. The Second Circuit has found as

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2 much.

3 Finally or in addition, we note that the defendant
4 is currently on supervised release in connection with the
5 second charge, the OpticsFast charge in 2015. And, you
6 know, we're here right now on new charges, but I think it
7 is fair to assume that there will be violations brought in
8 connection with his ongoing supervised release. And, of
9 course, if that were to happen in that situation, the
10 presumption would be reversed, and the presumption would be
11 in favor of detention.

12 And then, you know, just in light of all this
13 third time committing the same offense, the existence of
14 the aggravated identity theft charges with mandatory
15 minimums in the Complaint and also the potential of the USR
16 specifications, the defendant is facing significant prison
17 time and has ample reason to flee or evade prosecution.

18 And then truly finally, we note that at the time
19 of his arrest this morning, the defendant did not answer
20 the door for law enforcement, but then, in addition, when
21 law enforcement did enter the home and went to execute a
22 search warrant that it had for the premises, they found
23 computers that appeared to be hidden around the home and in
24 closets and various places. And it's the government's
25 contention that those computers were hidden in the

1 approximately five, ten minutes that the defendant
2 certainly heard law enforcement agents banging on his door
3 but, you know, but did not come to the door.
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5 So for all those reasons, the continued violations
6 of law, the failure to abide supervision and court orders
7 and the risk of obstruction, ongoing threats to the
8 community, the government is seeking detention.

9 THE COURT: Okay, Mr. Diaz?

10 MR. DIAZ: Thank you, your Honor.

11 Your Honor, we submit to the Court that a set of
12 conditions can be met here to ensure Mr. Borker's return to
13 court and ensure the safety of the community. Your Honor,
14 we are proposing 24-hour home detention, enforced by ankle
15 monitoring. My client is prepared to put his home up as
16 collateral, which he informs me has a Fair Market Value and
17 equity of approximately 4.8 million -- sir?

18 Two point two million, your Honor. I apologize.

19 THE COURT: Which is the reason someone's going to
20 be revisiting the issue of appointment of counsel, I guess.
21 Go ahead.

22 MR. DIAZ: I understand, your Honor.

23 In addition, my client's mother is also willing to
24 put up her property, which according to my client has a
25 Fair Market Value of approximately 525,000. And I believe

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2 that we will also be able to obtain two financially
3 responsible persons to serve as surety.

4 And the reason, your Honor, that I think that that
5 would be appropriate in this case is that, although the
6 government has made reference to Mr. Borker's prior cases,
7 what's noteworthy about that, Judge, is that he was granted
8 bail on those cases. He was out on bail during the
9 pendency of those cases. From my understanding from
10 Mr. Borker is he abided by his conditions. Additionally,
11 your Honor, this is a crime that is not a crime of
12 violence. Mr. Borker is the primary caretaker for his
13 elderly mother, who's approximately 87 years old. He's
14 also highly involved in the life of his four-year-old son.
15 Mr. Borker has no passport. He is a citizen of this
16 country, has no incentive to flee, your Honor, been a
17 lifelong resident of Brooklyn, with significant community
18 ties.

19 I am also asking the Court to consider the fact
20 that, you know, currently what's going on in the jails,
21 your Honor, with COVID and it's very difficult to work with
22 a client, and particularly in a case of this nature, which
23 appears to be a high-volume discovery case, it's been my
24 experience, your Honor, that my clients have not been able
25 to review discovery at the MDC, they've been suffering

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from, you know, pretty extreme conditions there that would prevent Mr. Borker from assisting effectively in his defense, your Honor.

And I think that, based on these circumstances, the bail package that's being proposed and the nature of the crime, that I think that bail would be appropriate in this case.

THE COURT: All right. Thank you.

I'll give the government a brief opportunity to respond. I'm not soliciting a response, but I want to give you an opportunity.

MR. WEINBERG: Yes, your Honor. I would just clarify one point. The government's understanding is that, while it is correct that the defendant was initially bailed at the time of his second arrest in connection with the OpticsFast scheme, the government's understanding is that shortly thereafter, violation specifications were filed, and at that time he was detained, is my understanding.

Again, you know, today right now we're here on the new charges; but, you know, I think it's reasonable to assume that there will be violations filed. And, you know, obviously, the conduct here is incredible, flagrant violation of his supervised release, and the government believes detention is appropriate.

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THE COURT: All right. I'll take a brief recess in the back. I'd ask the Pretrial Services officer to join me. And I'll be out shortly.

(Brief recess taken.)

THE COURT: Mr. Borker, I am required under the law to release you either with or without conditions imposed unless I determine there are no conditions that will reasonably assure your presence in court as required under the law and the safety of the community. In making a bail determination, I'm required to consider the following factors: the nature and circumstance of the offense charged, the weight of the evidence against you, your history and characteristics, and the nature and seriousness of the danger to any person or the community that would be posed by your release.

The government bears the burden of establishing by clear and convincing evidence that you are a danger to the community or by a preponderance of the evidence that you are a flight risk.

I've considered the Pretrial Services Report, which recommends detention, as well as the arguments of counsel; and I find that the government has met its burden of establishing that there are no conditions that I can impose that will reasonably assure your appearance and the

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safety of the community. I've considered the nature and circumstances of the offense charged, engaging in fraudulent conduct, the evidence is strong, and your criminal history. And the fact that you continued to engage in this conduct while under supervised release is a significant factor in my decision. And there's a danger to the community that this fraudulent conduct is going to continue. So I've considered all reasonable less-restrictive alternatives to detention, but I've rejected them. Obviously, counsel has the opportunity to appeal my order, should he so choose.

What would you like me to do with respect to the preliminary hearing date?

MR. DIAZ: Your Honor, we're prepared to waive to the 30th day.

THE COURT: Okay. So, Catherine, what's the 30th day?

THE CLERK: March 18th.

THE COURT: So March 18th for the preliminary hearing date.

Is there anything else from either side?

MR. WEINBERG: Nothing from the government, your Honor.

MR. DIAZ: No, your Honor. Thank you.

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THE COURT: All right. Thank you.

This matter is adjourned.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of USA v. Borker, Docket #22-mj-01638-UA All Defendants, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: May 5, 2022